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No. 390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

MINNEAPOLIS GAS COMPANY and METROPOLITAN UTILITIES DISTRICT OF OMAHA, *Petitioners*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM IN OPPOSITION OF INTERVENOR-RESPONDENTS

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Intervenor-Respondents support the position taken by the Federal Power Commission (Commission) in its Brief in Opposition to the Petition for a Writ of Certiorari. This statement of reasons for denial of the Writ is submitted in the nature of a supplement to the Commission's Brief.

Analysis of the Petition demonstrates that the entire fabric of Petitioners' argument is woven about a single Point, their contention that the Commission erred in issuing a certificate of public convenience and necessity to Northern Natural Gas Company (Northern) authorizing initial service to certain new communities because figures bearing on costs and revenues presented by Northern in a rate proceeding now pending before the Commmission differ from certain estimates of costs and revenues which were of record in the instant certificate proceeding.

Northern's instant certificate applications were filed on January 12, 1959 and hearings held thereon between April 20, 1959 and June 18, 1959. The overall economic effect of Northern's proposal to provide initial gas service to the new communities here involved was tested by the only proper evidence that could be adduced at either the time of filing the applications or at the time of hearing, i.e. overall system-wide cost and revenue data associated with and deriving from those rates then currently in effect and which would be charged to old and new communities alike. No valid purpose could have been or would now be served by developing a still further record testing the economic impact of Northern's expansion program upon the hypothesis of changed or even higher costs, since if system-wide costs change then so will system-wide revenues because rates designed to recoup such changed costs will necessarily be made effective and will be collected from all who are served from the system, be they old or new customers.

Moreover, the Commission's Order and the decision of the Court below must be sustained even if, as Peti-

tioners argue, Northern's system before expansion had a deficiency rather than an excess in revenues. All of the evidence of record, including that presented by Petitioners, established that, standing alone, on an incremental basis, estimated revenues from the new communities would be sufficient to cover annual costs and yield some measure of profit or return on Northern's investment. And, as the Court below pointed out, citing *Puget Sound Traction Light & Power Co.* v. *Reynolds*, 244 U.S. 574, 581 (1917), the various parts of a public utility system need not and cannot be equally profitable.

The issue here cannot properly be held to be one solely of economics. On the contrary, economics is only one factor in a total complex of many factors which must be considered by the Commission in deciding whether a natural gas expansion project, designed to serve those who have not had natural gas service, is required by the public convenience and necessity. Cf. *U. S.* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945).

Petitioners' approach ignores the most important, compelling and uncontradicted evidence in this case: the proven need for natural gas in the communities sought to be served. The case on their behalf, made by Northern and the distributors in those communities, was complete. To disturb the Commission's findings and order which certificated the new service and to require a rehearing on the narrow economic issue sought to be raised by Petitioners would not serve the public interest but would instead impose an undue and unnecessary burden on the Commission and the parties to the proceeding below.

The Commission's Order in this case was issued on the basis of a record which contained substantial evidence bearing upon the many factors which the Commission must weigh in determining the requirements of public convenience and necessity. As the Court below stated, "The Commission properly weighed the interests that will be served against those that will be injured and did not strike an arbitrary balance."

Finally, it must be noted that the objection to the Commission's Order, which Petitioners now urge before this Court, was not raised by Petitioners in their Joint Application for Rehearing filed with the Commission under date of August 27, 1959 (R. 11721-38), two months after Northern's rate increase filing was made. Petitioners were fully aware of that filing, yet no mention of the objection now being urged before this Court was set forth in their Application for Rehearing. Section 19 of the Natural Gas Act (15 U.S.C. 717r) provides that an Application for Rehearing to the Commission "shall set forth specifically the ground or grounds upon which such application is based" (Section 19(a)) and further provides that:

> "No objection to the order of the Commission shall be considered by the Court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so. * * *". (Sec. 19(b)).

The Petition for Certiorari is fatally defective on both substantive and procedural grounds. It should be denied.

Respectfully submitted,

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